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Attorneys for the Petitioners Keith Hill, Terry Monson, and Mitchell Sorensen

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER
DISTRIBUTION IN WATER DISTRICT
NO. 34 (THE BIG LOST RIVER)

**PETITION FOR RECONSIDERATION
OF FINAL ORDER REQUIRING
MEASURING DEVICES FOR GROUND
WATER DIVERSIONS**

KEITH HILL, TERRY MONSON, AND MITCHELL SORENSEN, (hereinafter the “Petitioners”), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, PLLC, hereby petition the Idaho Department of Water Resources (“IDWR” or “Department”) to reconsider its *Final Order Requiring Measuring Devices for Groundwater Diversions* regarding water distribution in Water District No. 34 (the “Final Order”), which was issued by IDWR Director Gary Spackman on July 12, 2013. This petition is filed pursuant to Idaho Code § 67-5246(4) and IDAPA 37.01.01.740.

I. BACKGROUND.

1. On July 12, 2013, IDWR Director Gary Spackman issued a *Final Order Requiring Measuring Devices for Ground Water Diversions*. The order was issued to “enforce the existing rule requiring measurement of ground water diversions” and because

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Department of Water Resources
Eastern Region

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DEPARTMENT OF
WATER RESOURCES

“[m]easuring devices on ground water diversions are necessary to ensure IDWR and the watermaster have the information needed to adequately deliver water and protect water rights in priority.” See cover letter accompanying *Final Order*.

2. IDAPA Rule 37.03.12.35.01 (Rule 35) provides that:

In addition to measuring devices or control works specifically described in the listing of the water right, each water user, except small domestic and stock water users from ground water, shall, at the water user’s expense, install and maintain measuring devices and control works of a type acceptable to the director, at all points of diversion and any other points, as determined necessary by the director for the proper administration of the use of water.

3. Furthermore, Idaho Code § 42-701 provides the following:

The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water.

4. Rule 35 and Idaho Code § 42-701 both require measuring devices on *all* points of diversion except small domestic and stock water uses from ground water. Water rights that divert from surface water are not exempt from this requirement, yet the *Final Order* only applies to holders of ground water rights. Therefore, the Director, through the *Final Order*, has failed to apply Rule 35 and Idaho Code § 42-701 in a proper and adequate manner.

II. ARGUMENT.

- A. **The Director has not fully complied with the provisions of Rule 35 and Idaho Code § 42-701.**

There is no dispute that a measuring device on ground water diversions is necessary for IDWR and the watermaster to adequately deliver water and to protect water rights in priority. In fact, the petitioners welcome the *Final Order* for these reasons. There are, no doubt, many ground water diversions that will have to take steps to come into compliance with the *Final Order*. Once that is done, IDWR, the water master, and the water users of Water District 34 will have the assurance that ground water is delivered according to the terms of each diversion's water rights and according to the law of prior appropriation.

Similarly, the Petitioners believe that measuring devices are equally necessary on all surface water diversions in Water District 34. Rule 35 and Idaho Code § 42-701, used as authority for the *Final Order*, both require that measuring devices be installed on *all* diversions – not just ground water diversions. If the purpose of requiring measuring devices on ground water diversions is to “ensure IDWR and the watermaster have the information needed to adequately deliver water and protect water rights in priority” then it follows that measuring devices should also be required on all surface water diversions.

Upon reconsideration, we request that the *Final Order* be amended to also require all surface water diversions in Water District 34 to have approved measuring devices. In its current state, the *Final Order*, while a welcome step, does not fully comply with the provisions of Rule 35 and Idaho Code § 42-701. This can be remedied by ordering that all surface water diversions have an adequate measuring device.

B. In the alternative to amending the *Final Order*, the Director could issue another order that applies specifically to surface water diversions.

Additionally, and in the alternative, rather than amending the *Final Order*, we note that the Director could issue another order that pertains specifically to surface water diversions. The Petitioners recognize that the requirements for measuring devices on ground water diversions and surface water diversions are not the same. For this reason, it may be simpler for the Director to issue another order to specifically outline the requirements for measuring devices on surface water


diversions.¹ In this case, the method that the Director uses to require measuring devices is not nearly as important as a requirement that applies to all diversions as contemplated by Rule 35 and Idaho Code § 42-701.

III. CONCLUSION.

For the reasons set forth above, the Petitioners request that the Director reconsider the *Final Order* and issue a new amended order that complies with Rule 35 and Idaho Code § 42-701 and requires measuring devices for all diversions in Water District 34 except those specifically exempted by Rule 35 or Idaho Code § 42-701.

In the alternative, the Petitioners request that the Director issue a new, separate order that requires measuring devices for all surface water diversions.

DATED this 26th day of July, 2013.



Luke H. Marchant, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C

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¹ Petitioners recognize that in many water districts, IDWR has issued orders requiring measuring devices for ground water diversions only. Petitioner notes however, that in 2007, IDWR issued an Order in Water District 170 requiring the installation of measuring devices and control works for diversions of ground water and surface water in Administrative Basins 71 and 72.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 26th day of July, 2013.

**DOCUMENT SERVED: PETITION FOR RECONSIDERATION OF FINAL ORDER
REQUIRING MEASURING DEVICES FOR GROUND
WATER DIVERSIONS**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Idaho Department of Water Resources	() <i>First Class Mail</i>
Eastern Region	(<input checked="" type="checkbox"/>) <i>Hand Delivery</i>
900 North Skyline Drive, Suite A	() <i>Facsimile</i>
Idaho Falls, ID 83402-1718	() <i>Overnight Mail</i>
	() <i>Email</i>

Idaho Department of Water Resources	(<input checked="" type="checkbox"/>) <i>First Class Mail</i>
Gary Spackman	() <i>Hand Delivery</i>
322 East Front Street	() <i>Facsimile</i>
PO Box 83720	() <i>Overnight Mail</i>
Boise, ID 83720-0098	(<input checked="" type="checkbox"/>) <i>Email</i>



Luke H. Marchant
Holden Kidwell Hahn & Crapo P.L.L.C.

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

DEPARTMENT OF
WATER RESOURCES

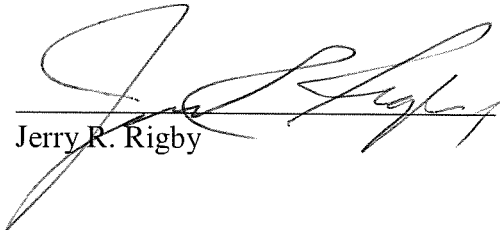
*Rec'd by email
7/25/13*

IN THE MATTER OF WATER)
DISTRIBUTION IN WATER)
DISTRICT NO. 34)
(THE BIG LOST RIVER))
_____)

MOTION FOR
RECONSIDERATION OF FINAL
ORDER REQUIRING
MEASURING DEVICES FOR
GROUNDWATER DIVERSIONS

Lloyd Pearson, by and through his attorney of record, Jerry R. Rigby of Rigby, Andrus & Rigby, Chtd, hereby moves the Court to reconsider its order issued on July 10, 2013 which orders all groundwater users in District 34 North of the "A" line to install measuring devices. This motion is supported by the attached memorandum.

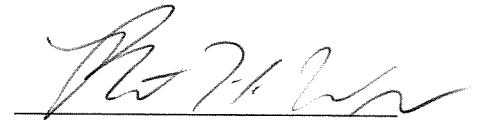
Dated this 25th of July, 2013.


Jerry R. Rigby

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July 2013, the above and foregoing document was served on the following parties by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

Gary Spackman, Director
Idaho Department of Water Resources
322 East Front Stree
PO Box 83720
Boise, Idaho 83720-0098


Robert H. Wood

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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

)	MEMORANDUM IN SUPPORT OF
IN THE MATTER OF WATER)	MOTION FOR
DISTRIBUTION IN WATER)	RECONSIDERATION OF FINAL
DISTRICT NO. 34)	ORDER REQUIRING
(THE BIG LOST RIVER))	MEASURING DEVICES FOR
)	GROUNDWATER DIVERSIONS
_____)	

Introduction

The Petitioner, Lloyd Pearson, submits this memorandum in support of his Motion For Reconsideration of Final Order Requiring Measuring Devices For Groundwater Diversions. The said Order ignores the fact that proper administration of senior and junior water rights in District 34 requires that both surface water and groundwater appropriators install measuring devices.

Background

On July 10, 2013, Director Gary Spackman of the Idaho Department of Water Resources, ordered that:

“Holders of groundwater rights in Water District No. 34 (the District), except those groundwater rights, uses and diversion identified below, shall install and maintain on each point of diversion or well, a measuring device of a type acceptable to the Idaho Department of Water Resources (Department) for the purpose of assisting the watermaster of the District in administering water rights and reporting the amount of water withdrawn from each well.”

The groundwater uses exempted from this order include domestic and stockwater uses as

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF FINAL
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defined by Sections 42-111 and 42-1401(A), Idaho Code, and diversions of water south of the “A-line” as shown in the map attached to the Order.

In a letter accompanying the Order, the Nick Miller of IDWR’s Water Distribution Section states “measuring devices on ground water diversion are necessary to ensure IDWR and the watermaster have the information needed to adequately deliver water and protect water rights in priority.”

The Order itself refers to Rule 35 of the *Idaho Department of Water Resources Distribution Rules - Water District 34*, which states:

In addition to measuring devices or control works, specifically described in the listing of the water right, each water user, except small domestic and stock water users from ground water, shall, at the water user’s expense, install and maintain measuring devices and control works of a type acceptable to the director, at all points of diversion and any other points, as determined necessary by the director for the proper administration of the use of water. The director may prohibit or prevent the diversion of water by a water user who refuses or fails to comply with this rule in accordance with the provisions of Chapter 7, Title 42, Idaho Code. *IDAPA 37.03.12.35.01*.

The Order also incorporates Section 42-701, Idaho Code, and lists the first 4 subsections of the statute. The first subsection states:

The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be such

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF FINAL
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construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

The Order only requires groundwater users to install measuring devices, and does not require surface water users to install or maintain such devices.

Argument

While the petitioner does not question the authority of the Director to require water users to install measuring devices, the Petitioner disagrees with and asks the Director to reconsider the order in District 34 requiring only the groundwater users in the District to install measuring devices. Mr. Miller's letter to water users gives the reason that the measurement devices are required of groundwater users in order to provide the Department and the watermaster with the information necessary to "adequately deliver water and protect water rights in priority." Due to the fact that many groundwater rights in District 34 are supplementary to surface water rights, and due to the fact that ground and surface water systems interact with each other, it follows that if groundwater measurement devices are needed for the reasons stated in Mr. Miller's letter, that

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF FINAL
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surface water measurement devices should be required as well. By requiring measuring devices solely for groundwater diversions, the Department lacks all the necessary measurements to adequately deliver water and protect rights in priority. The current order begs the question of why even require measurement devices on groundwater diversions if the same devices are not required on surface water diversions.

The reasons given in the Order for measuring groundwater diversions apply equally well to measuring surface water. If it is important to know how much groundwater is being diverted in an interactive system, then it is equally important to know how much surface water is being diverted. In the same way that a groundwater user may be diverting more water than is allowed by his or her right, a surface water user can just as easily divert more water than allowed. Due to the inherent nature of prior appropriation, any water right which is junior to another water right has the potential to go unchecked and cause harm to a senior right if it is not properly maintained and measured. The fact that most groundwater rights in District 34 are junior to the surface water rights in District 34 does not alleviate the need to ensure proper delivery and administration of surface water rights. It follows that if measurement of groundwater rights is needed for proper administration, then measurement of surface water rights would be needed for proper administration as well. If the Department only requires measurement of groundwater diversions, it lacks adequate information for proper administration.

While the prior appropriation doctrine protects water users who are first in time and right, it should not be used to deprive junior water users of an adequate and transparent accounting of the senior and junior rights in any given basin or system. By requiring only junior ground water

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users to install measuring devices, the Department is creating a system which does not provide an adequate accounting of the interaction between senior and junior diversions in District 34, thereby depriving junior water users of the ability to ensure the validity of calls on water. The Department is essentially asking junior ground water users to simply trust that senior water users aren't over-appropriating. Because water rights are limited in quantity, a junior water right holder is protected by proper accounting of senior rights. The Department's order only provides an adequate and transparent accounting to the senior surface water users, and thus falls short of giving all water users in the District the protection they are entitled to.

Idaho law allows the Director of the Department of Water Resources to require measurement devices. Idaho Code § 42-701(1). The law specifically contemplated measuring devices on both surface and ground water diversions by granting the Director authority to place measurement devices "at such point as is most practical in such canal, ditch, wellhead or pipeline...". *Id.* Whereas the Director has the authority to require measuring devices on both surface and ground water diversions, and whereas requiring measuring devices on all diversions would better facilitate the administration and supervision of water rights in District 34, it appears arbitrary of the Department to require only ground water users to install measuring devices. An agency action is arbitrary if "it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 536 P.2d 729 (1975). Here, requiring only groundwater users to install measurement devices disregards the fact that measuring devices on surface water diversions would be equally beneficial in the administration of water rights.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF FINAL
ORDER REQUIRING MEASURING DEVICES FOR GROUNDWATER DIVERSIONS.

Conclusion

Proper administration of surface water and groundwater rights would require measurements on surface and groundwater diversions. The reasons given by the Department for the current order apply to surface water diversions as well as they do to groundwater diversions, and the current order provides an accounting to senior water users of junior water use but does not provide junior water users with an adequate and transparent accounting of senior water right appropriations. As currently issued, the Order is arbitrary because it disregards the facts and circumstances presented without adequate determining principles. As such, the Petitioner respectfully moves the Department to either reconsider and rescind its current order, or to issue an additional order requiring surface water users to install measuring devices as well.